Bob Gregory

From: Bob Gregory
Sent: Wednesday, December 14, 2016 7:17 PM
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Subject: Critical Information About Items 46, 52, 53
Attachments: TDS Response to B Gedert 12-13-16 Memo.pdf

Please see the TDS response to Mr. Gedert's 12/13/16 memo (attached).

Mayor and Council Members:

Items 46, 52 and 53 on this week's meeting agenda propose enormous changes in established City policy with regard to collection, processing and disposal of solid waste (which includes biosolids), recyclables and compostables in Austin. Approval of these items would effectively endorse City staff's aggressive new "policy-making by RFP" approach, which proposes not only to create new City policy without previous City Council direction but also to validate current staff practices based on distortions of existing Council policies. To be very clear, each of these RFPs has been orchestrated by City staff without *any* input or direction from the City Council or relevant Boards and Commissions. I will be at the December 15th City Council meeting to further address the concerns outlined below:

Item 46: Citywide Dumpster Collection Services Contract / Republic Services

While we understand this item may be postponed from the December 15th agenda, TDS urges the Council to vote NO when this item is eventually taken up, and to instead direct City staff to draft a new RFP or IFB for City facilities *only*; to *not* compete with private haulers and processors; and to submit all future solicitations to the Zero Waste Advisory Commission (ZWAC) and Electric Utility Commission (EUC) for policy review prior to release, **ideally *without* the restrictions of the Anti-Lobbying Ordinance.**

This proposed contract with Republic Services (Republic) is the calamitous result of RFP SLW0514 for "Citywide Dumpster Collection Services" issued on June 6, 2016. This RFP requested pricing for collection, processing and disposal of solid waste, recyclable and compostable materials from a large number of City-owned facilities (some of which are *already under contract* with TDS and another hauler), including Class II non-hazardous waste and special waste from Austin Energy; and for emergency response services.

Critically, this RFP also requested pricing for collection, processing and disposal of *commercial* solid waste, recyclable and compostable materials, including for City-sponsored and co-sponsored special events. However, it has been City

policy for *decades* that the City of Austin would service only single-family residences and small businesses within residential routes that only need residential-style cart collection, while *commercial and multi-family properties requiring dumpster service would be serviced exclusively by licensed private haulers in a competitive market*.

Approval of this contract would effectively nullify this longstanding City policy (contained in City Code 15-6-11 through 13) and instead provide City staff with the tacit authority and means to take over all commercial solid waste, recyclables and compostables hauling in Austin. Indeed, Texas Health and Safety Code Section 364.034 (a) expressly allows City staff to require any commercial or non-exempt institutional entity to utilize and pay for solid waste, recycling and composting services provided by the City through its contractor or franchisee(s), and this contract indeed proposes to engage Republic as just such a "toll hauler", furnishing trucks, dumpsters and employees to act on the City's behalf. At a minimum, approval of this contract would immediately force City-licensed haulers and processors like TDS to *compete directly with our own municipal regulator* in the free marketplace for commercial waste, compostables and recyclables collection services.

With specific regard to City staff's explicit proposal to use this contract to provide solid waste, recycling and composting services to City-sponsored events and co-sponsored special events, please note that City staff has said that *because there is no Council-adopted definition of "City-sponsored event or co-sponsored event", any individual City department may qualify any Austin event as being "City-sponsored or co-sponsored" by way of a department sponsorship*. At the same time, City staff asserts that providing *a full range of solid waste, recycling and composting services* to such events (as they have in fact already begun to do, utilizing the existing City facilities contract) is actually based on a 2009 City Council directive, Resolution No. 20091022-040, which states that "The City Council directs the City Manager to implement recycling at City sponsored events on City public rights of way and City facilities for which the City waives rental fees."

Accordingly, as fee waivers may only be granted by City Council action, it's clear that only City Council action – not department decision-making – should determine which Austin events City staff should provide (or facilitate) *only* recycling services for. Yet of the 19 "example" events listed in the RFP – events for which *a full range of solid waste, recycling and composting services* may be required under this contract – only *two* are actually the recipient of City Council fee waivers. *Further, 17 of the 19 events listed in the RFP are currently serviced by TDS.* In short, City staff has already far surpassed its authority to compete in the commercial marketplace for solid waste, recycling and composting services, and is now asking for City Council's sanction to not only continue to distort previous Council direction but to dramatically expand service; and such expansion of services could include activities requiring a City permit, including construction and demolition hauling, composting and recycling services.

Of gravest concern may be the extreme secrecy with which City staff has conducted this RFP process and the disastrous possible long-term consequences for our community. Indeed, City staff has taken the remarkable and unprecedented position of refusing to answer basic questions regarding the recommended proposal or the contract that would be based on it, and have even gone so far as to prevent recommended proposers from answering questions at Board and Commission meetings. **It is for this reason, among others, that both ZWAC and the EUC declined to support this proposed contract.**

While City staff has stated that state law prevents them from discussing any of the details of the proposal or the contract prior to execution of a final contract, it's clear that the quoted state statute is being interpreted in a manner that would dramatically change the way City staff has sought approval of contracts in the past, when it has always been the practice for staff and the recommended proposer to answer questions of Board / Commission members and City Council members. See linked or attached opinion addressing staff's misinterpretation of the law.

City Staff has also stated they are prevented from discussing any contract details due to non-disclosure agreements (NDA) signed by individual staff members. Indeed, Austin Resource Recovery Director Bob Gedert stated at the November ZWAC meeting that he himself had signed an NDA preventing him from answering questions. However, copies of each NDA signed in connection with this solicitation, released under a public information request, show that in fact none were signed by Mr. Gedert.

Regardless, if City staff is allowed to continue to pursue this unprecedented course of action, the City Council will render itself, its Boards and Commission, and its public constituents incapable of adequately analyzing proposed City contracts to ensure compliance with City policy and community priorities. Indeed, the RFP process provides wide latitude to the proposer to submit creative offers that may go beyond the scope of the solicitation, and / or to take exception to any part of the RFP. Compromising transparency in the way City staff has attempted to do during this process can only result in undesirable consequences.

In fact, it was finally revealed only yesterday that undesirable consequences are deeply embedded in Item 46, specifically as it relates to the operation of local landfills. You may recall that one year ago, in December 2015, this City Council voted unanimously to deny City staff's request to extend a contract for Class II Non-Hazardous Industrial Waste collection and disposal services for Austin Energy based on the fact that the proposed contractor had closed its local landfill facility and was proposing to utilize the problematic Waste Management-Austin Community Landfill (WMI-ACL) for the disposal of the subject waste material.

The exact same set of facts exist today with respect to this proposed contract. Republic is again the proposed contractor. The same Austin Energy Class II Non-Hazardous Industrial Waste is now folded in to this much larger contract for *all* City-generated waste (and more). And the proposed landfill facility is once again the WMI-ACL. As it was in December 2015, this is profoundly problematic as it relates to Austin's environment and quality-of-life; particularly with City staff providing the Council with an unsupportable opinion that the Council can't restrict the disposal of City waste in a particular landfill.

Please remember that in 2008, City staff unilaterally entered into a Rule 11 Agreement and agreed to a restrictive covenant removing the City Council's opposition to the expansion of Republic's Sunset Farms landfill and supposedly requiring the permanent closure of the facility by November 1, 2015. Unfortunately, while the Republic landfill did close to the receipt of waste on or about October 31, 2015, **that Rule 11 Agreement and restrictive covenant are not binding to the owners of the land comprising the Sunset Farms Landfill at that time or now, according to the Travis County Deed Records.** We pointed this out and suggested remedies at the time, but City staff apparently was willing to allow the agreement to not be enforceable. Only the owner of the landfill permit is bound, and a simple permit modification can change the name on the permit from one subsidiary owned by Republic to another subsidiary owned by Republic, or to another qualified company. Since the restrictive covenant was executed by entities that did not own the land comprising the landfill it is not a binding restriction on the use of the land. See opinion on the Rule 11 Agreement and restrictive covenant.

You are probably aware that the Republic landfill is adjacent to the WMI-ACL. If the operation of the site were to transfer from Republic to WMI, WMI would be able to combine and expand the combined landfills, fill in the valley between the two landfills, and raise the height of the landfill over the combined disposal footprint. Such an expansion could add over 110,000,000 cubic yards of disposal capacity to landfills that have been the source of heated controversy in our community for decades, one of which contains extensive amounts of what today would be considered unmitigated hazardous waste and has in the past been disqualified from consideration for City disposal contracts due the potential for significant environmental liability for the users of the site, according to a third party engineering study commissioned by the City.

I firmly believe this combination and expansion of these problematic landfills is the goal of WMI, Republic and, unfortunately, City staff. Indeed, there is no legal impediment to the combination of these landfills. No restrictive covenant is binding on the current landfill land owners BFI, Waste Systems of North America, Inc., and Mobley Chemicals, Inc. Given that the increased volume of material received by the WMI-ACL since the closure of the Republic landfill has reduced the expected remaining life of the WMI-ACL to approximately 4.5 years, it is clear that Republic and WMI are both extremely eager to expand their local disposal capacity in this manner. It is equally clear that if the City Council were to award this contract, Republic and WMI would use that long-term commitment of City waste to the WMI-ACL as a basis to dispute or nullify any City opposition to their planned expansion. Without the benefit of complete information, it's possible the City Council would not even be aware they are binding the City in this manner.

Finally, allow me to please reiterate the alarming scope of this RFP and proposed contract, even beyond its implications for the commercial marketplace. The City of Austin has long had a contract for collection of solid waste and recyclables

at City facilities. This contract was previously called “Refuse & Recycling Collection Services for City Departments” and was intended to simply handle the waste and recyclables generated by City departments in their day-to-day operations. Staff has stated that the contract before you is simply a renewal of this previous contract. In fact the proposed contract before you is instead a massive consolidation of several different previous contracts with a dramatically expanded Scope of Work and a proposed funding authorization nearly tripling that of the previous six-year period (from $6,045,540 to $16,995,000). Despite City staff’s claims to the contrary, there has never been any directive from the City Council to combine and expand these contracts in this way. And, alarmingly, while City staff has represented that efficiency and cost savings are the primary impetus for consolidation, they have yet to provide any data showing that costs will go down, as opposed to up, if this contract is approved.

To be clear, approval of this contract would provide the means for City staff to roll all existing City solid waste and recycling contracts into this one as they expire, without any action of Council. For example, the contracts for the Central Business District, Austin-Bergstrom International Airport, the Austin Convention Center and any other City contract for commercial waste services could simply be added to this contract by City staff. In fact, Convention Center and Airport locations are specifically referenced in the RFP documents. Perhaps this is why City staff is requesting such a massive increase in funding authorization while stating that inflation is the main reason. Regardless of City staff’s stated intentions, if this contract is approved, *it could be the last contract for solid waste and recycling collection services brought before the City Council for at least six years*, as it would be completely within City staff’s power to utilize this contract for all future service needs without Council’s consent.

I would note that TDS did not respond to this RFP because it represents dramatic and detrimental changes in City policy which TDS would have been unable to address with City Council members under the restrictions of the Anti-Lobbying Ordinance. I would additionally note that the recommended vendor, Republic, *also* did not respond to the RFP by the submission deadline. TDS representatives were present at the bid opening and watching online when City of Austin purchasing staff announced that WMI was the *only* respondent to the RFP. Only later did City staff announce that they had in fact received *two* RFP responses; a troubling circumstance which has yet to be explained.

Item 52: Waiver of Anti-Lobbying Ordinance for Biosolids and Composting Solicitations

TDS urges the City Council to vote YES on Item 52 *if* it is amended to waive the restrictions and penalties of the Anti-Lobbying Ordinance for all future City solicitations for all biosolids and composting processing and disposal, *and* all solid waste, composting and recycling processing and disposal. **This is appropriate and indeed *urgent* given the singular circumstance of City-licensed operators (private haulers and processors like TDS) being forced to compete directly with their own regulator, as the associated Items 46 and 53 propose to do.**

The minimum requirement for adopting Item 52 must be the simultaneous rejection of Item 53, the Synagro contract, in order to clearly avoid any appearance of a City Council sanction of the Anti-Lobbying Ordinance violations that occurred during this RFP process. In this circumstance, a new RFP or IFB should be issued only after City biosolids management policies have been clearly established by the City Council, with the new solicitation(s) designed to achieve clear policy goals.

TDS otherwise urges the Council to vote NO on Item 52, if City staff’s intention in bringing forward the item is, as it appears, to retroactively waive the Anti-Lobbying Ordinance in order to forgive violations that occurred for *any* reason. To do so would be to abandon objectivity and consistency in the application on what amounts to a limit on free speech – a chilling prospect.

Please be reminded that in 2010, City staff charged TDS with a violation of the Anti-Lobbying Ordinance associated with a solicitation to which we had not responded. City staff refused to withdraw the violation, and TDS was forced to file suit against the City. A Federal judge ruled that no violation had taken place and ordered the disqualification removed from TDS’ record. **City staff’s demonstrated misapplication of the Anti-Lobbying Ordinance – including strategic staging of RFPs to maximize limitations on contractors’ ability to communicate with the City Council or public – along with the conflict inherent in being forced to compete with a regulator, is the reason TDS has been unable to respond to recent City solicitations.**

Item 53: "Beneficial" Reuse of Biosolids

On November 9, 2016, I emailed you a detailed communication regarding this contract and the associated violations of the Anti-Lobbying Ordinance. I stand by the facts and positions in that communication. TDS urges the City Council to vote NO on Item 53 and to instead direct staff to create a new RFP or IFB that is reflective of established City biosolids management policy; that requires the continuation of the Dillo Dirt program; that is reviewed by ZWAC and the Water and Wastewater Commission (WWC) prior to publication; **and ideally that does *not* include Anti-Lobbying Ordinance restrictions.** Alternatively, TDS' 30-year contract with the City of Austin expressly allows direct negotiation for the provision of these services; so TDS doesn't really have to respond to the RFP.

Please recall that on August 11, 2016, City Council did *not* act on City staff's request to approve this contract but rather directed that a detailed policy review of the contract be undertaken by ZWAC and the WWC to ensure that the contract was in compliance with City policy and did not create new policy not considered by City Council. A limited policy discussion was held by a joint working group of the ZWAC and WWC over the course of three private meetings, and some policy positions were formulated by this working group; however, no review of the proposed Synagro contract took place. *The contract was only supported by the joint working group based on City staff's stated intent to reflect the working group's policy goals in the final contract.*

The full WWC did recommend approval of the contract, but without being able to fully review the contract documents. The full ZWAC was prohibited by staff from even discussing the contract, and were only allowed to recommend policy preferences. Overall, it is plain that City staff prevented the Commissions from adequately fulfilling the City Council's August 11th directive. Further, despite Synagro's public commitment on August 11th to release a complete version of their proposal and contract for public review, significant redactions remain in the latest posted version. According to Synagro these redactions concern subcontractors and location and intended use of the offsite facilities that will be used by Synagro and the City, yet Synagro has at the same time certified that no subcontractors would be used to provide the contracted services.

While it appears City staff has made some limited changes to the posted contract documents, even the limited policy statements adopted by the Commissions have not been adequately addressed. Based on the available information, this contract will *still* result in the termination of the Dillo Dirt program, as there is no requirement for Synagro to produce any amount of Dillo Dirt, and no prescriptive method for production of Dillo Dirt or any type of compost. Indeed the draft contract still states that Synagro's entire composting process will take three to four weeks, even though *it is impossible to make compost in this amount of time.* There is additionally no requirement that the Travis County Siting Ordinance for Solid Waste Facilities be adhered to for either processing, composting or land application of sludge at the yet to be identified location of the offsite processing facility and the tracts of land in Travis County to receive the land application of the Class A biosolids, inappropriately described as Class A compost.

Finally, please note that Synagro has a well-documented recent history of corruption and bribery scandals, readily discoverable online. Further, since this contract was last before you, Synagro has been sued by over one hundred plaintiffs in Pennsylvania alleging severe impacts to their health and the environment caused by the land application of Class A biosolids, as we understand it, the exact process Synagro proposes for Austin. Please do not allow the same catastrophe to occur in our community.

Thank you in advance for your careful consideration of these complex issues.

Sincerely,
Bob Gregory
(512) 619-9127

TDS Summary / Bullet Sheet

MEMORANDUM
TDS ANNOTATED VERSION

TO: Mayor and City Council

CC: Zero Waste Advisory Commission
Austin Energy Utility Commission
Water / Wastewater Commission

FROM: Bob Gedert, Director
Austin Resource Recovery

DATE: December 13, 2016

SUBJECT: **City Facilities Dumpster Collection Services Contract**

The purpose of this memo is to provide background on this proposed contract and address various concerns raised by stakeholders and Commissioners regarding the City Facilities Dumpster Collection Services contract scheduled for Council consideration on December 15, 2016.

TDS has annotated this memo to ensure that the City Council members, Board and Commission members, and the public receive complete information with which to analyze this proposal by City staff. Please note this memorandum makes no mention of the proposer's planned utilization of the Waste Management Austin Community Landfill (WMACL) to service this contract, which raises a broad range of profound environmental and quality-of-life concerns for the Austin community.

BACKGROUND

This Request for Proposal (RFP) covers four specific waste and recycling services:

- Servicing city-owned facilities,
- Dumpster collection for operational needs,
- Servicing city sponsored special events, and
- Servicing Austin Energy Industrial Class 2 and Special Waste.

As it relates to this RFP's major implications for free competition in Austin's commercial marketplace, the most critical fact omitted here is that this RFP additionally requested extensive pricing for a range of dumpster collection services NOT specific to any of the above, or to any facility or location.

Many private haulers and processors like TDS who, per city code, compete in the free market to provide commercial services, are gravely concerned that approval of this contract would result in Austin Resource Recovery (ARR) utilizing this pricing to broker Republic's services throughout Austin's commercial marketplace – just as staff explicitly plans to continue and expand doing in the commercial marketplace for special events, using this contract – in order to generate significant future Enterprise Fund revenue.

Adding to our industry's alarm, the RFP additionally states that "Service locations may be added or changed at the discretion of the City" and "Possible additional services may be required related to the URO, Zero Waste initiatives, or other City needs as required", raising concerns about the unknown full intent and scope of the solicitation and the resulting contract.

In the broadest terms, this RFP and proposed contract appear to many in our industry to have been engineered to give City staff some if not all of the tools needed to effect sweeping changes in City policy and extend control over the city's entire commercial marketplace, greatly expanding the current problematic dual role of ARR as both Industry regulator and competitor. This, together with staff's continued misapplication of the Anti-Lobbying Ordinance, is the reason that TDS did not respond to this RFP.

Servicing city-owned facilities - As you know, City employees collect residential trash within our service area. We are limited to that service by City Code Chapter 15-6-11 which stipulates that the City may only provide collection service to residential properties with less than five dwelling units. Therefore, because Austin Resource Recovery (ARR) only provides residential trash cart service, the City contracts with a private hauler to pick up trash and recyclables from our city facilities. This new contract adds organics collection to city facilities, including City Hall. This service is typical for any public or commercial facility.

Omitted here is a commitment to obligate ARR to continue servicing only residential containers, or any analysis of the possible impact of this RFP and contract on City Code Chapter 15-6-11. This is because City staff understands that city code is superseded by state law, and that Texas Health and Safety Code Section 364.034 (a) expressly allows City staff to require any non-exempt commercial or institutional entity to utilize and pay for solid waste, recycling and composting services provided by the City or its franchisee(s).

Specifically, state law allows the City to:

- Contract to provide solid waste services for persons in its territory.
- Require those persons to use and pay for the solid waste services.
- Make those solid waste services a public utility for which the City has a regulatory monopoly over persons in its territory.

Regardless of their stated intent, as noted, this proposed contract plainly provides City staff with the means to exploit state law and utilize Republic Services' prices, trucks, dumpsters and employees to act on the City's behalf in the commercial marketplace.

Please be aware that over the decades, City staff has regularly attempted to greatly expand control over the local solid waste and recycling marketplace. While staff's efforts are typically presented to the City Council and public as intended to advance

policy goals – for example, increasing landfill diversion or expanding recycling – they are in fact intended to generate ever-increasing City revenue, up to and including fully transforming the competitive market into a monopoly serviced only by the City or its franchisees, as was recently done in the City of Los Angeles.

Indeed, three times since 1985, City staff has undertaken efforts to either entirely control parts of the marketplace or designate all waste services a public utility and transform all private haulers and processors into revenue-generating franchisees whose services and rates are controlled by the City. In each case, City staff has acted without previous direction from the City Council – including even acquiring the vehicles and dumpsters needed to provide exclusive commercial service throughout downtown Austin – and in each case the City Council has ultimately rejected staff's plans. In 1993 and again in 2008, thousands of Austin business owners signed petitions calling on the City Council to reject City staff's proposals to shut down competition and take over the free market.

Finally, please note also that this is not a simple or "typical" contract renewal for servicing a public facility but instead a dramatic consolidation of all City facilities service into a mega-contract with a single national vendor, to the exclusion of local competitors big and small. Further, while City staff has asserted that the primary intent of this consolidation is to achieve efficiencies and save money, this $16.9 million, 6-year contract in fact appears to represent a significant increase in cost to taxpayers.

Dumpster collection for operational needs - The City regularly needs dumpster collection for emergency clean up situations that require trash and recycling services. Under the current contract with Republic Services, the Department has relied on Sections 3.0 (C) Special Collection and (D) On-Call to obtain dumpsters for emergency clean-up of the 2014 and 2015 floods. We need to have this "on-call" service already under contract in order to respond to our community after an emergency. The new contract includes specific standards to meet emergency and storm debris management needs in situations that require larger-scale clean-up volume than the City is able to provide with existing equipment and personnel.

A separate Council authorization has already allocated $1.2 million to such emergency management needs. The inclusion of these services in this proposed contract is redundant and raises concerns that City staff is providing the City Council with incomplete information.

Servicing city sponsored special events - Since approximately 2007, ARR has contracted to provide dumpster service to City Co-sponsored events and other department sponsored events such as the Austin New Year. Due to the volumes of waste generated and need to store trash or recycling overnight, special events - including City Co-sponsored events - generally require dumpster service. As mentioned above, ARR only provides cart service so we contract with a private hauler to provide dumpster collection for city special events that require trash and recycling services. When ARR is asked by a City Co-sponsored event organizer to coordinate their waste management needs, ARR staff utilizes the city facility dumpster contract. The fee waiver presented to Council includes a request to waive recycling dumpster service fees. The event organizer is billed at the same rate charged to the City for landfill trash dumpster service. As a governmental entity, ARR does not profit from any services provided, including coordinating dumpster service.

A full list of city special events noted in the RFP is attached. This proposed contract **does not** require event organizers to use ARR coordinated services. It is not the intent of ARR to enlarge services, but rather better manage the waste flows of special events where the organizer does not have the capacity to sign a waste hauling contract. Instead, approval of this contract maintains the status quo which:

1) Offers waste and recycling services through a competitive bid from a private hauler to gain the best pricing available;
2) Allows the event organizer to request bids to choose from various waste management service providers or use the ARR selected contractor; and
3) Enables the City to provide coordinated dumpster service using a Council approved contract, if the event organizer chooses ARR coordinated waste management services.

In 2009, the Austin City Council adopted Resolution No. 20091022-040, which states: "The City Council directs the City Manager to implement recycling at City sponsored events on City public rights of way and City facilities for which the City waives rental fees." On this basis – direction to implement *only* recycling and *only* at City-sponsored events for which City rental fees are waived – City staff have utilized the existing City facilities contract to broker, without Council authorization, complete solid waste, recycling and composting services to Austin events that meet *none* of this criteria. (If staff was providing such services before 2009, they were acting without Council direction.)

To point, this RFP listed 19 "example" events for which complete solid waste, recycling and composting services could be required. Only two of the 19 events are the recipient of City Council fee waivers; further, 17 of the 19 events listed in the RFP are currently serviced by TDS. In short, by unilaterally expanding the definition of City-sponsored events to include essentially any event in Austin, City staff has *already* far surpassed its authority to operate in the commercial marketplace for solid waste, recycling and composting services, and is now asking for City Council's sanction to not only continue to distort previous Council direction but to dramatically expand its brokered services.

Regardless of whether ARR *currently* profits or would ultimately profit from this practice, it is simply untrue that "ARR does not profit from any services provided." Indeed, TDS would urge City Council and Board and Commission members to speak with leaders at Goodwill, the Salvation Army, Habitat for Humanity and other local non-profit organizations who have recently learned that City staff, without Council authorization or community input, executed a 6-year contract with Simple Recycling that *generates a $20.00 per ton profit* to ARR for the curbside pickup of used clothing and household items for 193,000 Austin residences – a major diversion of revenue from the marketplace for second-hand items that many non-profit groups have traditionally relied upon to help finance the valuable community services they deliver.

Separate from whether ARR will immediately profit or the question of City staff's long-term ambitions for growing revenue, this contract represents a plain attempt by City staff to continue expanding control over at least one segment of the commercial marketplace, festivals and events, through brokered services delivered by a preferred vendor. Further, if this new contract were to be approved, the preferred vendor would additionally enjoy the competitive advantage of commercial pricing based on a bid that was bundled together with the full volume of a 6-year contract for all City of Austin facilities.

Finally, it is of course inconceivable that the organizer of a community event of sufficient standing to receive a Council-approved sponsorship would at the same time "not have the capacity to sign a waste hauling contract." It's equally suspect to assert that ARR's goal is simply to "better manage the waste flows of special events" when doing so requires what we believe to be ARR's true goal, continuing and expanding brokered event services on behalf of a preferred vendor as a means of eventually extending full control over the commercial market, as is expressly allowed under state law.

Servicing Austin Energy Industrial Class 2 and Special Wastes - Class 2 and Special Wastes are defined by the Texas Commission on Environmental Quality (TCEQ) as "solid waste that does not meet the criteria for hazardous waste...." Section 2.6 of the RFP specifically states that the Class 2 and non-hazardous special wastes generated by the City include used treated wood utility poles, certain contaminated soil, Class 2 wastewaters, rust, spent desiccants, unused solid chemical products, non-PCB bushings/capacitors, and asbestos. These wastes are normally generated during the normal course of operating an energy plant.

This service, specifically for AE, was brought to Council for their consideration at the December 10, 2015 Council meeting. At that time, Council voted not to extend a contract with Republic Services to manage Austin Energy's (AE) Class 2 non-hazardous waste. Instead, Council directed staff to develop a contract solicitation that would NOT be Austin Energy specific, but would be broader so as to include every City Department. Council wanted to ensure that the City would not bring forward several departments-specific contracts but instead bring a city-wide contract that would include diversion requirements and address pricing concerns. This is consistent with the Council direction from April 11, 2013 regarding folding in the AE contract into a city-wide contract for waste and recycling services provided to city facilities. AE is currently relying on an existing contract with Green Environmental Services. However, this contract was intended for remediation services of construction projects. Using the contract with Green Environmental Services as opposed to a dedicated contract for Class 2 materials is causing significant inefficiencies in AE's ability to manage its waste stream from various power plant facilities.

TDS urges City Council and Board and Commission members to please review the video or a transcript of City Council's December 10, 2015 meeting. At no time during this meeting did the City Council, or any City Council member, ever direct City staff to consolidate City contracts. Neither did the City Council reject the previous proposed contract with Republic in order to "include diversion requirements and address pricing concerns" but rather because of Republic's planned utilization of the WMACL facility. This is a simple fact check revealing troubling fabrications.

Please note that while it's true that Mayor Pro Tem Tovo did ask City staff at this meeting to encourage the diversion of treated Austin Energy utility poles when rebidding the rejected Republic contract, there were no diversion requirements included in this RFP and are none included in this proposed contract. Further, while Council never discussed pricing concerns at the December 15, 2015 meeting, such discussion among Council and Board and Commission members would certainly be appropriate now, given that this proposed consolidated contract appears to authorize roughly $10 million more than the sum of its previous unconsolidated parts, including the previous Austin Energy contact.

PREPARATION FOR THIS SOLICITATION

Soon after the December 10, 2015 Council meeting, ARR and AE staff discussed options to move forward with a new solicitation. At the time, ARR recognized that the city facilities dumpster contract was scheduled to expire and acknowledged Council's concern that Class 2 and Special Wastes could be generated by other Department activities. To streamline contract management needs and utilize the City's economies of scale, ARR and AE jointly agreed to include Class 2 and Special Wastes in the new solicitation for use by all City departments. When drafting the RFP, staff considered Council's concerns regarding diversion requirements and other environmental issues.

Once again, City Council's rejection of the proposed Republic Services contract in December 2015 was based on environmental and quality-of-life concerns related to the use of the WMACL facility. That this proposal again utilizes the WMACL facility suggests that the redrafted RFP in fact did nothing to acknowledge the concerns that the City Council actually did express. We are unaware that the City Council has ever expressed concern or otherwise ever asked City staff to address whether Class 2 or Special Waste could be generated by other department activites.

Subsequently, after meeting with City departmental stakeholders, Austin Resource Recovery developed this RFP to accomplish the following goals:
1. Streamline contract management and respond to direction from City Council to combine various departments' waste contracts into a single contract;
2. Benefit from the economy of scale generated by combining contracted waste collection services into one solicitation;
3. Provide specific standards to meet the Departments' customer service needs; and
4. Address Austin Energy's and other City department' s need to manage Industrial Class 2 and Special Wastes.

Once again, the RFP additionally requested pricing for collection services unrelated to any current City need, and was NOT the result of direction from the City Council to combine City facilities waste contracts, as no such direction was ever given.

BIDS RECEIVED

The Request for Proposals (RFP) closed on July 28, 2016. Despite statements made by stakeholders, there were two respondents: Republic Services, Inc. and Waste Management of Texas, Inc .

TDS representatives were present at the bid opening and watching online when City of Austin purchasing staff announced that WMI was the only respondent to the RFP. Only later did City staff announce that they had in fact received two RFP responses, a troubling circumstance which has yet to be explained.

Proposals from both respondents were evaluated in accordance with the evaluation factors included and published in the RFP which consisted of the following:

- Overall costs and best value to the City
- Company experience and history
- Company facilities and equipment used to perform services

- Community impact and zero waste collaboration efforts
- Compliance with all regulatory requirements
- References

COMMISSION CONSIDERATION

Three commissions were asked to consider the Request for Council Action (RCA) to authorize and negotiate a contract for refuse, recycling, organics, and special waste collection for city facilities and operations; the Zero Waste Advisory Commission (ZWAC), Water and Waste Water (W/WW) Commission (in respect to servicing Water facilities) , and Electric Utility Commission (EUC).

The **ZWAC** recommended against the proposed contract. Their stated objections were as follows:

- *"Lack of diversion policies/ goals;*
- *Inclusion of the Austin Energy waste which is problematic for reasons that date back to original version of the contract rejected by Council*
- *Expansion of services*
- *Tripling of cost*
- *Lack of information about location of the landfill*
- *Lack of information about carbon footprint*
- *Concern about the impact of special events services"*

City staff have conducted this RFP process in an unprecedented fashion by refusing to answer the most basic questions regarding the recommended proposal throughout the Board and Commission process, based on the broadest possible interpretation of state law. This is the main reason both ZWAC and the EUC declined to support this proposal.

The **EUC** chose not to take action on the item. Commissioners expressed concern that Austin Energy (AE) did not have a contract to manage its Class 2 waste stream. During the discussion, Commissioners also noted that the issues being highlighted were ARR policy issues with minimal reference to AE. Therefore, they did not feel comfortable taking action on the item.

In fact, a motion to recommend approval of the contract failed at the EUC for lack of a second, a 9-1 rejection of staff's request.

The **W/WW** Commission inquired as to whether or not the dumpster contract would be utilized for the purpose of moving biosolids. Staff explained that the contract is not intended for that use since AWU is committed to composting biosolids. The Commission voted unanimously to recommend approval of the contract.

It is unclear why the WWC was asked to consider this consolidated contract for all City facilities when other Boards and Commissions relevant to other impacted City departments were not.

CONCERNS/ ISSUES and STAFF RESPONSE

- "This contract expands the service authority of Austin Resource Recovery"

STAFF RESPONSE - This contract does not service commercial building accounts for non-city buildings, and does not include any wastes streams referenced in the Synagro or Click contracts recently reviewed by City Council.

As noted, Austin Resource Recovery already has the authority under state law to require all commercial businesses to use their preferred services if only they are granted the means to do so by the City Council. This proposed contract would do so, regardless of City staff's stated intent.

- "Policy via RFP – ARR is attempting to provide dumpster service throughout the community to "take over" from private haulers"

STAFF RESPONSE – As stated above, this contract does not service commercial building accounts for non-city buildings, and does not include and wastes streams referenced in the Synagro or Click contracts recently reviewed by City Council. City Code Chapter 15-6-11 stipulates that the City may only provide collection service to residential properties with less than five dwelling units. By ordinance, the City staff are not able to provide dumpster service to commercial and multi-family properties.

Again, state law supersedes city code. Regardless of staff's current stated intent, this contract could indeed be used to "take over" commercial business from private haulers.

- "Why doesn't the City just contract for these services directly from Texas Disposal Services (TDS) under its existing landfill services contract?"

STAFF RESPONSE - Past City Council practices and preferences dictate that these services go through a competitive bidding process. We agree that a competitive process is a "best practice" throughout the country and support the Council policy. However, if City Council prefers to award these services to TDS without a competitive process, the existing landfill services contract is worded broadly enough that Council could just award the work to TDS. While other providers may balk at such an award…this industry is highly competitive… that is a policy decision within Council's discretion. Therefore, in compliance with that fundamental "competitive bidding" practice, ARR will continue to solicit for private hauler services for City departmental operations at competitive rates and provide these contracts for Council consideration.

While this is the first time City staff have acknowledged that TDS' existing landfill services contract would allow the City to directly negotiate for the provision of specific additional services – indeed, Mr. Gedert has previously asserted the opposite – in fact TDS has never suggested that this contract by awarded to us on such a basis. Further, we have never and would never advocate against a fair and open competitive bidding process. We have previously communicated to the City Council and Board and Commission members that our existing contract would allow negotiation for the provision of biosolids processing and curbside collected organics processing that are the subjects of other RFPs and proposed staff contracts.

- "There are no diversion requirements or standards whatsoever."

STAFF RESPONSE – Sections 4.6 thru 4.8 of the RFP clearly state that any materials source separated for recycling or composting must be processed at a legally operated facility agreed upon by the City for recycling or composting. Contract negotiations could

allow the City to clarify any facilities that are not eligible for use. Regarding Diversion requirements, the Universal Recycling Ordinance (URO) places the responsibility of diversion goals onto the organization that generates the waste stream, not the private haulers who transport the materials.

As noted, at the December 15, 2015, City Council meeting, Mayor Pro Tem Tovo encouraged City staff to prioritize the diversion of treated Austin Energy utility poles when rebidding the rejected Republic contract, but there are no diversion requirements for the Austin Energy waste in this proposed contract. This is a concern given the fact that TDS was able to divert over 46% of the Austin Energy waste stream when TDS was the contractor. To our knowledge, Republic Services has not diverted any of the material since assuming the Austin Energy contract, nor would they do so under this proposed new contract.

- "ARR contracted dumpster service for City Co-sponsored events could possibly take opportunities from private hauler."

STAFF RESPONSE – To address this concern, Council could pass a resolution directing ARR to discontinue providing services or provide limited services to City Co-sponsored events, excluding coordinated dumpster service. This would mean that the event organizer would coordinate directly with a private hauler and incur all dumpster service fees directly from the hauler. Events organized by a City department would still be able to secure services under the proposed contract. For example, Austin's New Year and AE's Community Resource Fair are events that are organized by City staff, included in participating Department budgets, and require dumpster service.

Whlle the City Council should not have to direct City staff to stop doing something they were never directed to do in the first place, we nevertheless agree that the Council should establish that City staff play no role in providing or brokering solid waste, recycling or composting services to events in Austin unless the event is organized by City staff.

- "Concerns were raised regarding the qualifications of selected Disposal Facilities"

STAFF RESPONSE – Recognizing environmental and diversion concerns expressed previously by Council, the new RFP stipulates that the City will not send waste to a non-qualified or non-permitted facility. During the solicitation process, vendors were required to submit ten year compliance histories of any potential contractor. Additionally, materials that are source separated for recycling or composting must be processed at a legally operated facility agreed upon by the City for recycling or composting. Processing and disposal facility information cannot be disclosed at this time because state law prevents disclosure of bid proposal specifics, such as subcontractors, until Council approves the bid and accepts the proposal. As previously stated, contract negotiations could include the City clarifying any facilities that are not eligible for use.

Once again, City Council's rejection of the proposed Republic Services contract in December 2015 was based on environmental and quality-of-life concerns related to the use of the WMACL facility. That this proposal again utilizes the WMACL facility suggests that the draft RFP did nothing to acknowledge Council's stated environmental concerns. In short, City staff is continuing to propose what has previously been rejected by this City Council and ZWAC. If City staff have analyzed the WMACL facility since

December 2015 and found that the serious environmental concerns that disqualified this facility from consideration at that point and before have been mitigated, this information should be released.

- "Options for Utility Pole Recycling are preferred over landfilling"

STAFF RESPONSE – Specific to recycling utility poles treated with creosote, ARR staff researched diversion options and found that there are generally three methods currently available and each have their own challenges:

Reuse – some utilities offer utility poles to the public for reuse as fence posts and other salvage purpose. However, there may be liability concerns to offering chemically treated poles for use by the public. Texas Disposal Systems (TDS) indicated that when they had the contract with Austin Energy, they reused the utility poles. However, they have not produced documentation indicating proof of reuse vs stockpiling.

Incineration/Waste-to-Energy – some utilities grind and chip the utility poles as fuel at waste-to-energy facilities, considering this practice as diversion. From a Zero Waste perspective, waste-to-energy systems are lowest on the hierarchy of best use. Additionally, the environmental community has expressed concern about the carbon footprint impact of waste-to-energy.

Landfill Disposal – many utilizes dispose of their utility poles in landfill. From a Zero Waste perspective, disposal is generally the last option on the hierarchy of best use.

Chemically treated utility poles cannot be recycled, and all utilities have limited options. However, ARR and AE can negotiate language into the contract that would divert utility poles based on the City Council's preferred management method.

Nearly 50% of the Austin Energy waste is recyclable or reusable, including utility poles and scrap metal. It is obviously the Council's preference that these materials be recycled or reused, however staff has resisted requiring that diversion. Used utility poles are reusable items and storage of diverted materials is part of every reuse or recycling process. TDS would be delighted to host any City Council and / or Board and Commission member at our Creedmor facility to review our management of reusable materials.

- "Staff is attempting to utilize this contract to manage biosolids".

STAFF RESPONSE – Although biosolids are considered a Class 2 or Special Waste stream by TCEQ, Austin Water (AW) is committed to composting its biosolids and does not intend to utilize this contract for biosolids management. If an emergency situation occurred such as severe fire risk, other imminent threat to health and safety, or imminent risk of regulatory non-compliance that could not have reasonably been foreseen, AW would first rely on its biosolids management contractor. But, if AW's contractor proved to be unreliable or needed assistance, AW could utilize this contract and direct the material to a compost facility. In such a situation, AW would notify the City Council via a Corrective Action Memo within five business days of the declaration of emergency conditions.

As far as we know, this represents denial of an accusation that no one has made and accordingly raises serious concerns, given especially that City staff is also proposing a separate biosolids contract on the December 15, 2016 agenda that has similarly been steeped in secrecy.

- "ARR is expanding the contract to include Organics Collection"

STAFF RESPONSE – Yes, this contract includes Organics collection to City facilities, including the City Hall, via the contracted hauler. The current city facility dumpster contract does not include organics collection. This new contract would ensure the City's ability to comply with the Universal Recycling Ordinance's (URO) organics diversion requirements and make collection and food waste available to all city facilities, including City Hall (as requested by several Council members). This contract does not offer organics collection to non-city buildings or other commercial businesses.

This contract does include organics collection. However, City staff has previously stated that it will implement organics collection not at all City facilities but instead only at City Hall and one other location. The truth remains unclear, but staff's position that the addition of organics collection service is a significant contributor to the vastly expanded cost of this contract can only be far overstated. Note that the URO only requires organics collection at facilities with a food service permit.

Staff recommends approval of the contract. Contract approval could also be accompanied by clarifications to:

1. As Council expressed concerns about specific landfills in Northeast Austin, Council could exclude specific disposal or processing facilities from availability to the vendor during contract negotiations. This option requires specific objective criteria to avoid the legal liability of flow control;

Unfortunately, Mr. Gedert has often misspoken regarding flow control and the Carbone Supreme Court decision, which has no bearing on this issue. The City can contractually require or prevent the delivery of solid waste, recyclables and compostables that it generates to any facility it chooses.

2. As stakeholders have expressed concerns about the extensive length of the special events, Council could exclude the provision of dumpster service to special events, with an exception for events that are organized by a City department. This action would place the responsibility of contracting for waste/recycling services onto the event organizer;

Again, we would support affirmative action by the City Council to terminate the provision of any and all commercial solid waste, recycling and composting services provided by ARR, including for special events, and definitive direction regarding strict adherence to City Code Chapter 15-6-11 in the absence of alternative Council direction.

It is the intent of ARR to exclude biosolids management from this contract, except in emergency situations such as severe fire risk, other imminent threats to health and safety, or imminent risk of regulatory non-compliance that could not have reasonably been foreseen. Council could direct Austin Water to notify the Council via Corrective Action Memo within five business days of declaring the emergency condition before utilizing this contract for Biosolids management.

For more information, please contact ARR Director Bob Gedert at 512-974-1926.
Attachment: City special events listed under this RFP solitication

This contract should not be approved by Council. At a minimum, City staff should be directed to present the full, unredacted proposal and contract to appropriate Boards and Commissions for questions and review prior to a request for City Council approval.

MEMORANDUM

Date: December 14, 2016
To: To Whom It May Concern
From: Gary Newton, General Counsel, Texas Disposal Systems

Re: Austin City Council December 15, 2016 Agenda Items 46, 52 and 53

Introduction

During the review of the above referenced agenda items by the various City of Austin (City) Commissions, City staff made several misrepresentations about solid waste and contract issues. This memorandum is a brief explanation by Texas Disposal Systems (TDS) of why the City staff's statements are wrong and misleading. These misrepresentations relate to the following issues:

- TDS Master Contract and Composting;
- Waste and Recycling Flow Control;
- Competitive Bid Requirements; and
- Confidentiality of Information in Proposed Contracts.

The only reason I can provide you with this information to correct City staff misrepresentations is because TDS did not respond to various RFP's related to these agenda items due to concerns involving the City staff's arbitrary application of the Anti-Lobby Ordinance. TDS also had concerns the RFP's in this instance are fatally flawed in numerous ways as TDS pointed out in written communication to City staff, various City Commissions, and Council members. If TDS had responded to the RFP's and subjected itself to the restrictions of City staff's interpretation of Anti-Lobby Ordinance, TDS could not address the following misrepresentations with anyone in the City other than the designated contact person. The arbitrary application of the Anti-Lobby Ordinance by City staff is used as a tool to silence all voices other than those of City staff. Please feel free to contact me if you have any questions on any of these issues.

TDS Master Contract and Composting

I understand in the November 9, 2016 Zero Waste Advisory Commission (ZWAC) meeting during a discussion of Item 3.d. regarding Organics Processing, a Commissioner requested a legal opinion from an unbiased party about whether the TDS Master Contract allows the City to add food waste composting services without going through a bid process or a request for proposal process.

Although I cannot give you an independent third party opinion since I represent TDS, I can provide you a copy of the section out of the TDS Master Contract in effect with the City of Austin, entitled Waste Disposal and Yard Trimmings Processing Contract, dated May 12, 2000 for you to form your own opinion (Tab 1). The relevant sentence in the attached Section 32.A. needs no legal expertise to understand when it says, "In addition to the above, TDS and City reserve the option to amend this Contract upon mutual consent to (i) allow TDS and/or its affiliated companies to operate a glass pulverizing facility; and (ii) allow TDS to provide composting services." If anyone were to state composting was not offered by the TDS Master Contract, that would be a deliberate misrepresentation of the plain language you can read in the TDS Master Contract.

Furthermore, if any City vehicle showed up tomorrow at TDS' gatehouse with a load identified as food waste it would be accepted. TDS would divert the food waste to the composting operation and charge the City the rate for waste disposal already in place pursuant to the TDS Master Contract. No change to the contract is really necessary except to memorialize in detail each parties responsibilities regarding food waste composting.

I also understand City staff also misrepresented the TDS Master Contract could not be used because it does not mention food waste. Well it does not have to because TDS' facility is authorized to compost food waste and has been doing so for almost 20 years. In fact, TDS reported to Texas Commission on Environmental Quality it composted approximately 16,000 tons of food waste in the last fiscal year, which is way more than any other local facility.

Waste and Recycling Flow Control

In the November 9, 2016 ZWAC meeting some very confusing and misleading statements were made by Bob Gedert about waste and recycling flow control. The statements were made during the discussion on Item 3.e City Facilities Dumpster Collection Services – Contract to provide dumpster collection services for City of Austin facilities to include non-hazardous class 2 waste collections. I believe Mr. Gedert was trying to reference a U.S. Supreme Court's decision that prohibits cities from enacting flow control ordinances that confer a benefit on a privately owned facility as a justification for not specifying a landfill to be used in a collection and disposal contract with a private company. Mr. Gedert said, "I would note that when we bid contracts out we do not designate a landfill and therefore we do not practice flow control. The U.S. Supreme Court has ruled that we cannot prohibit waste from entering a private landfill and we cannot promote a private landfill by government edict. There is restrictions on the government on controlling waste streams, and we do not control waste streams. "

Mr. Gedert's statement was in response to a question about whether Austin Energy waste was being transported by Republic Waste to its landfill in San Antonio. His statement above was a misapplication of the phrase "flow control" that gave the impression the City could not tell its contractor where to dispose or not to dispose waste. This is absolutely untrue. The City has broad authority under Texas Health & Safety Code Chapter 363 to enter into solid waste management contracts on terms considered appropriate to the City. The City can designate which landfill it wants its contractor to use and if the contractor does not agree the City does not have to do business with the company. For example, the City can contract with Republic Waste and insist Republic Waste use the TDS Landfill rather than the Waste Management Austin Community Landfill as long as Republic Waste agrees to that condition as a term of the contract. If Republic Waste refuses to agree to use a specific landfill the City does not have to enter into a contract with Republic.

The type of flow control prohibited by U.S. Supreme Court is an entirely different fact situation. The Supreme Court has ruled a city cannot pass an ordinance directing third parties to use a specific privately owned waste processing or disposal facility (See Carborne V. Clarkstown, 511 U.S. 383 (1994). Mr. Gedert is wrong to suggest a Supreme Court ban on "flow control" ordinances that confer a benefit on a private facility prohibits the City from designating a specific waste processing or disposal facility in a contract between the City and a private company. Contrary to what Mr. Gedert stated to you on November 9, 2016, the City can say to its contractor that provides waste services "this is a dirty landfill, none of our waste shall go there."

Competitive Bid Requirements

A couple of City staff emphatically stated at the November 9, 2016 ZWAC meeting State law requires the City to competitively bid the organics and City facilities proposed contracts for processing, hauling and disposal services. This statement is totally incorrect. It has been the law in Texas since at least 1936 that cities do not have to competitively bid proposals like waste and recycling services that are for the preservation of public health or safety. The City can directly negotiate with all willing providers of these services to obtain the best deal for the citizens without being limited by time consuming RFP or IFB processes or by burdensome anti-lobby restrictions. The City can also negotiate with TDS and amend its existing Waste Disposal and Yard Trimming Processing contract dated May 12, 2000 to add these, without going through a competitive bidding process.

I have attached an excerpt from a recent case (Tab 2) that explains this in a concise manner so you do not have to just take my word on this issue. Republic Waste is certainly aware of this because one of its companies was the defendant in the attached case that successfully argued state competitive bidding requirements do not apply to contracts for collection and disposal of solid waste.

Confidentiality of Information in Proposed Contracts

This section is response to an incorrect statement made by a City of Austin Purchasing Office staff person during the discussion of agenda Item 8, at the November 14, 2016 Electric Utility Commission (EUC) meeting. The relevant portion of the statement was "…. around disclosure of proposals, of contents, anything like that, that is per Texas Local Government Code Chapter 252 and that states that any of the proposals that we receive are confidential until the award so we would not be able to disclose the pertinent details of a proposal or any of those details. That's actually from State law." The statement reflects a City staff strategy for obtaining the EUC's approval of a contract without telling the EUC any details about the contract.

The strategy and statement are an incorrect characterization of State law. What the Texas Local Government Code actually says (Tab 3) in Section 252.049(b) "…..proposals shall be opened in a manner that avoids disclosure of the contents to competing offerors and keeps the proposals secret during negotiations." The language in this section is very straight forward and simple. Note the key words "…..that avoids disclosure…. "and "secret during negotiations." All proposals must be kept confidential until the negotiations are complete unless disclosed by the respondent, not until the contract is finally awarded and executed. The Purchasing Office staff was either badly misinformed or deliberately misleading in responding to questions. In the case of Item 8 on the November 14, 2016 EUC agenda, we understand that the negotiations were complete. The EUC was being asked to recommend Council approval of the negotiated Republic Services contract without disclosing actual terms of the negotiated contract to the EUC. The statute's language does not say the Republic Services proposal and the draft negotiated contract are to be kept secret until the award and execution of the contract, but instead allows a full public disclosure of the proposed contract and a full discussion of all related facts after negotiations are complete. If City staff does not allow the Republic Services proposal and draft contract to be reviewed by the EUC, and important questions and concerns discussed and responded to before the EUC is to recommend the execution of a final contract, that is a decision arrived at by City staff, it is not required by State law. Confidential treatment of RFP or IFB responses and the details regarding negotiated contracts is only required by State law until the contract is negotiated, not until after award of a contract.

The EUC had every legal right to inspect the draft negotiated contract and the Republic Services proposal that formed the basis of the draft negotiated contract before making a recommendation that the Council execute the contract. In my opinion, it would be a dereliction of duty for the EUC to vote to recommend the approval of a draft contract the EUC did not review. City staff could have requested the EUC to approve a recommendation to simply negotiate but not execute the contract. City staff should then come back to EUC with the negotiated contract for review prior to the EUC vote to recommend the execution of the contract. Only when the EUC has no real concerns involving the intricacies of the RFP or IFB responses and the particulars of the negotiated contract should the EUC recommend Council approval of a contract.

Perhaps the Purchasing Office misread the last sentence in Section 252.049(b) that says, "All proposals are open for public inspection after the contract is awarded…" Note it does not say all proposals must be kept secret until the one recommended contract is awarded, as the Purchasing Office would have everyone believe. This sentence is a mandate on City staff to allow anyone that is interested to review all proposals after the contract is awarded. This language is meant to prevent a situation where City staff represents a contract is entered into with the best proposer, but then tries to keep the other proposals secret to avoid comparison.

Date: December 12, 2016

To: Whom It May Concern

From: Gary Newton, General Counsel, Texas Disposal Systems

Re: City of Austin Council Agenda, December 15, 2016, Item 46
Proposed Republic Services Citywide Dumpster Contract and the
Re-opening of Sunset Farms Landfill

If the Austin City Council approves Item 46 on the above referenced agenda awarding "Republic Services" a 6 year "Citywide Dumpster Collection Services" contract, with its Scope of Work, which includes "Non-Residential Collection Services for Refuse, Recycling, Brush, Compostable Materials, Special Events, Class 2 Non-Hazardous Waste, and Emergency Collection Assistance," it could be the catalyst for re-opening the Sunset Farms Landfill (SFL) TCEQ Permit 1447A (Tab A) in order to expand the SFL to fulfill the requirements of the still undisclosed terms of the contract with the City. Moreover, by awarding the contract, Republic Services would have a basis to challenge the City if the City Council were to oppose the expansion of SFL.

SFL stopped accepting waste on November 1, 2015, due to a permit condition agreed to in an October 31, 2008 Rule 11 Agreement (Tab B). The Rule 11 Agreement signed by Robert Goode, Assistant City Manager, and Holly Noelke, Assistant City Attorney, on behalf of the City was entered into with BFI Waste Systems of North America, LLC (BFI, LLC) and Giles Holdings, L.P. (GH, L.P.) for the City to drop its opposition to the specific contested case hearing process for the 2008 SFL amendment to Permit 1447A. As stated in the Republic Services, Inc. Securities and Exchange Commission filings, BFI, LLC is a subsidiary or affiliate of Republic Services.

The 2008 Rule 11 Agreement Purportedly Closed The Landfill

The Rule 11 Agreement also contained a condition that a Restrictive Covenant (Tab C) placing a deed restriction on the SFL property prohibiting any waste disposal or processing activities after November 1, 2015, even though the deeds indicate BFI, LLC and GH, L.P. are not, and were not, the owners of the land comprising the SFL according to the Travis County deed records. The reality is the City staff should have known, and possibly did know at the time the Rule 11 Agreement was signed that the deed restriction language would not accomplish the goal of permanently closing SFL on November 1, 2015.

In 2008, Bob Gregory, President and CEO of Texas Disposal Systems (TDS), provided a memo to the Mayor informing the City how to draft an effective deed restriction. Mr. Gregory sent a memo (Tab D) to the Mayor outlining the defects with the form of the proposed deed restriction and suggesting ways to make it enforceable against subsequent owners. In 2007, BFI, LLC proposed a deed restriction to Travis County in exchange for Travis County dropping its opposition to the landfill expansion in Permit 1447A. The proposed 2007 deed restriction was substantially similar to the version agreed to by the City in 2008. TDS informed the parties opposed to the landfill 2007 proposed expansion that the deed restriction was ineffective and provided language to cure the defects as contained in Exhibit B of the 2008 memo contained in Tab D.

There are two reasons why the deed restriction on file in the Travis County Deed Records is ineffective to keep SFL from operating after November 1, 2015. First, the SFL property owners, then and now according to the deed records, did not execute the deed restriction, so it is not binding on the property. Second, the language of the deed restrictions in the Restrictive Covenant only restricts two entities BFI, LLC and GH, L.P., from operating SFL after November 1, 2015. Any other entity that Republic Services chooses can operate SFL unrestrained by the deed restriction.

If the proposed Citywide Dumpster Collection Services contract in Item 46 is approved on December 15, 2016, Republic Services, the assumed current entity in control of SFL, can move forward with an amendment to the SFL Permit 1447A to eliminate the November 1, 2015 closing date requirement and expand SFL to accommodate the volume of waste anticipated to be received from the City under the Item 46 contract. This new City contract can be used by BFI, LLC, the current owner of the permit, and an affiliate of Republic Services as the reason SFL would have to be re-opened, and SFL was closed with unfilled capacity previously approved by the TCEQ in its most recent major permit amendment.

The True Owners According To The Deed Records

According to the Travis County Deed Records, the entities that executed the Restrictive Covenant were not the SFL landowners of record in 2008 with the authority to bind the property. The landowners of record with the last deeds on file are BFI Waste Systems of North American, Inc. (BFI, Inc.) since 2004, and Mobley Chemicals, Inc. (MCI) since 1982. The diagram (Tab E) indicates the four tracts of land that comprise the SFL property. One of the tracts, as indicated, appears to be owned by BFI, *Inc.*, not BFI, *LLC*, who signed the Rule 11 Agreement and Restrictive Covenant. The other three tracts appear to be owned by MCI, not GH, L.P., who also signed the Rule 11 Agreement and Restrictive Covenant. Please see the deed records currently on file in the Travis County Deed Records, which indicate BFI, Inc. (Tab F) and MCI (Tab G) were the owners of record in 2008, and continue to be the owners of record, for the four tracts and not the entities which actually executed the Rule 11 Agreement and Restrictive Covenant.

On October 31, 2008, BFI, LLC and GH, L.P. were totally different entities from the SFL property owners according to the Travis County deed record – the property owners were BFI, Inc. and MCI. BFI, Inc. and MCI should have signed the Rule 11 Agreement and Restrictive Covenant. BFI, LLC and GH, L.P. purported to be the only SFL property owners in the Rule 11 Agreement, even though the last deeds on file, as discussed above and attached, indicate they were not the owners of the property when they entered into the Rule 11 Agreement and executed the Restrictive Covenant as part of settlement in the SFL expansion case (SOAH Docket No. 582-08-2178). This Rule 11 Agreement was signed by Brad Dugas for BFI, LLC, Steve Mobley for GH, L.P., in addition to Robert Goode and Holly Noelke on behalf of the City of Austin.

Limitations of the Rule 11 Agreement and Restrictive Covenant Create An Expansion Opportunity

The language of the Restrictive Covenant prohibited BFI, LLC and GH, LP, and only these two entities, from receiving, processing, recycling, and disposing of waste at SFL. Any other entity besides BFI, LLC and GH, LP can conduct these activities. Through a simple permit modification, Republic Services can transfer the SFL TCEQ Permit 1447A from BFI, LLC to another specific Republic Services affiliated entity, perhaps the Republic Services entity whose name will be on the yet-to-be-revealed contract being considered for an award under Item 46 on the December 15, 2016 Austin City Council agenda. Republic Services could pursue the re-opening of SFL without any recourse by the City of Austin or the public. The need for landfill capacity and the revenue from a contract with the City in Item 46 above could be the justification for Republic Services to re-open SFL. The TCEQ Permit 1447A for SFL can then be amended by the new permit holder to re-open SFL, expand it, or combine it with the adjacent Waste Management-Austin Community Landfill (WMI-ACL) in order to process, transfer, recycle, compost or dispose of that waste as allowed under an amended combined permit.

The Need To Expand Is Imminent And Republic Services Needs An Excuse To Do So

SFL has about 3 years of unused landfill capacity remaining in its TCEQ Permit 1447A, as originally approved by the TCEQ, which could be utilized for the City waste disposed under the Item 46 contract. The adjacent WMI-ACL has an estimated life of less than 5 years (see calculations on Tab H). If Republic Services combines SFL with the adjacent WMI-ACL and expands the combined landfill footprint, the combined landfill could have decades of landfill capacity and could rise more than 200 feet above the ground level.

Conclusion: Deny Republic Services A Citywide Dumpster Contract

For the above stated reasons, the Austin City Council should seriously consider the possible ramifications of a vote to approve the contract under Item 46 on the December 15, 2016 agenda, and require City staff to identify the specific name of the Republic Services contracting entity; the landfill which Republic Services intends to utilize for the disposal of the waste generated as part of the proposed contract; the location of the facility for the processing of recyclables and compostable material collected under the contract with the City and whether that location is the SFL or the WMI-ACL; whether the Republic Services RFP response and the proposed contract have any provisions regarding the utilization of the SFL and/or the adjacent WMI-ACL facility; and whether the specific Republic Services contracting entity has waived its right to seek a permit amendment to re-open SFL.

Bob Gregory

From: Bob Gregory
Sent: Wednesday, November 09, 2016 4:53 PM
To: 'steve.adler@austintexas.gov'; 'kathie.tovo@austintexas.gov'; 'ora.houston@austintexas.gov'; 'delia.garza@austintexas.gov'; 'sabino.renteria@austintexas.gov'; 'greg.casar@austintexas.gov'; 'ann.kitchen@austintexas.gov'; 'don.zimmerman@austintexas.gov'; 'leslie.pool@austintexas.gov'; 'ellen.troxclair@austintexas.gov'; 'sheri.gallo@austintexas.gov'
Cc: 'mwhellan@gdhm.com'; Gary Newton; Adam Gregory; Ryan Hobbs; Paul Gregory
Subject: Item 65 - Anti-Lobbying Ordinance Violations / Synagro-Click Contracts

Mayor and Council Members:

Item 65 on this week's meeting agenda involves an Executive Session presentation and discussion of violations of the Anti-Lobbying Ordinance (ALO) by respondents to RFP CDL2003 for biosolids management (Synagro) and RFP JXP0501 for the sale of unscreened Dillo Dirt (Mr. Allen Click). As you may know, these two Austin Water RFPs and proposed contracts fully outsource management of Austin's biosolids (the end product of the City's wastewater stream), including the administration and effective termination of the Dillo Dirt composting program, which has been a City mainstay since 1989.

While City staff has provided us with no information, we believe Item 65 may derive from the formal ALO complaint filed by TDS General Counsel Gary Newton on 10/3/2016. That complaint and the subject violations are the unfortunate result of City staff's most recent misapplication of the ALO before and following the City Council's unanimous vote on 8/10/2016 to direct both the Zero Waste Advisory Commission (ZWAC) and the Water and Wastewater Commission (WWC) to review City policy changes effected by the two RFPs and proposed contracts. In response to Council's direction, a joint meeting of ZWAC and WWC convened on 9/14/2016 and voted unanimously to create and appoint a joint working group, dubbed the Hornsby Bend Working Group (HBWG), which was given specific direction to meet over a 4-week period to consider both RFPs and proposed contracts and to return recommendations to the originating commissions for their review and consideration for recommendations to Council. The transcripts of some of these meetings are available at www.texasdisposal.com/hornsby-bend.

Meetings of the HBWG were subsequently held on 9/20/2016, 9/27/2016 and 10/5/2016. However, per the bylaws of both ZWAC and WWC, the HBWG meetings were not public meetings required to adhere to the provisions of the Texas Open Meetings Act; accordingly, no public notice of any of the three "informal" working group meetings was given. Despite this, at the 9/20/2016 HBWG meeting at which TDS representatives were present, Synagro representatives were in attendance and directly addressed HBWG members. Synagro's representatives' remarks provided information about the company's RFP response, advancing its interests as a respondent. At the 9/27/2016 HBWG meeting, with TDS representatives again present, both Synagro and Mr. Allen Click were in attendance, and both directly addressed HBWG members. Again, remarks made by both respondents provided information about their respective RFP responses, advancing their interest as respondents. In both cases, the representations made were prohibited during the ALO's no-contact period, which began on 4/4/2016 and continues today for both RFPs.

Importantly, both the 9/20/2016 and 9/27/2016 HBWG meetings attended by TDS representatives (and presumably also the 10/5/2016 HBWG meeting, whose time and place City staff declined to share with TDS) were convened and conducted, per the direction of ZWAC/WWC, by HBWG member and WWC Chairperson Susan Turrieta. Nonetheless, at the 9/20/2016 HBWG meeting, Ms. Danielle Lord, the City's authorized contact person for RFP CDL2003, who was in attendance **but did not initiate or direct the working group**, represented to TDS that her presence at the meeting sanctioned Synagro to provide information about their RFP response to HBWG members (and the numerous other present City officials) without violating the ALO. We assume Ms. Lord, who was also in attendance at the 9/27/2016 HBWG meeting, to have held the same view vis-à-vis Synagro's representations made at that time. However, as noted in the 10/3/2016

complaint, we do not believe Mr. Joshua Pace, the City's authorized contact person for RFP JXP0501, to have been present at the 9/27/2016 HBWG meeting at which Mr. Allen Click made the aforementioned representations.

Regardless, there is no reading of the ALO indicating that the simple presence of the City's authorized contact person at a private meeting convened and conducted by other City officials would allow RFP respondents to make representations otherwise prohibited during the ALO no-contact period. Once again: Neither of the HBWG meetings at which TDS representatives were present were convened or conducted by the City's authorized contact person for either RFP, but instead, per the direction of ZWAC/WWC (whose own action originated with the 8/10/2016 City Council vote), by the HBWG itself.

Indeed, the idea that any RFP's authorized contact person could simply "piggy back" onto any planned private meeting between a respondent and another City official in order to sanction prohibited representations violates not only the letter but certainly also the initial intent of the ALO, which was to promote transparency and provide a "level playing field" for RFP respondents. As noted, however, this is only City staff's most recent misapplication of the ALO, which in our strong view has been transformed from a tool for preventing favoritism on the Council dais into a tool for advancing favoritism at the staff level. Over and over again, the broad restrictions and absurdly severe penalties of alleged violations of the ALO have been exploited by City staff to limit and control the flow of information available to City policymakers and the public about proposed City purchasing contracts. This is not a benign policy failure but rather promises to come at ever-increasing expense to Austin taxpayers.

In the case of TDS, the City's largest waste and recycling partner and a recognized national leader in sustainable resource management, our locally-owned and operated family business has been forced to simply forgo responding to recent City RFPs, including the biosolids RFPs, in order to preserve our right to freely share information and perspective with policy makers and community leaders working to make important, complicated and expensive long-term policy and planning decisions. Declining the ALO's vow of absolute silence has been especially critical in the face of a recent onslaught of "policy making by RFP" proposals by City staff, including not only the Austin Water biosolids RFPs and proposed contracts but also Austin Resource Recovery's recent "Citywide Dumpster Collection Services" RFP and forthcoming proposed contract with Republic Services, which envisions an enormous shift in the City's solid waste policy, including an unprecedented municipal incursion into the commercial hauling marketplace, without any prior direction from the City Council. Unquestionably, however, in the case of each RFP that TDS has been forced to forgo responding to, policymakers have lost contracting options that might have saved Austin taxpayers millions of dollars.

(I would additionally note that City staff's misapplication of the ALO has not only limited contracting options and cost savings available to policy makers, but also undermined broader policy objectives. Witness last November's ALO disqualification of the recommended Consumer Advocate for Austin Energy customers based on a prohibited representation initiated not by the RFP respondent but by the chair of Electric Utility Commission.)

As you can imagine, given our profound misgivings about the staff's misuse of the ALO, TDS took no joy in filing the ALO complaint that we believe to be the subject of Item 65. Indeed, on 9/7/2016, Synagro had itself submitted a formal request to the Purchasing Office that the City Council vote to exempt biosolids management RFPs, bids and contracts from compliance with the ALO. While deeply concerned about both RFPs and proposed contracts – a concern that has only grown since learning much more about Synagro's history and operations elsewhere involving their proposed plans for managing the City's biosolids – TDS nevertheless expressed our strong support for Synagro's request (which we understand Synagro later withdrew), even though we had already at least twice observed Synagro and City staff in what we believed to be ALO violations. However, as long as City staff continues to misapply the ALO, TDS will not only continue to forgo responding to RFPs but also continue to do what we can to point out the reasons we believe the staff is abusing the ALO, in order to eliminate TDS from participating in important City solicitations.

Regardless of whether Synagro and/or Mr. Allen Click are ultimately disqualified from responding to the Austin Water RFPs as a result of ALO violations (which we believe would be the result of any objective enforcement of the ordinance), TDS still urges decisive Council action with regard to the "policy making by RFP" approach embedded in these two proposals and at least two others scheduled for Council consideration. In the case of

the Austin Water RFPs and contracts, rather than City staff simply giving the lowest-priced qualified bidder carte blanche – with the sole exception of landfilling – to manage most of Austin's biosolids in whatever way they choose (as the proposed Synagro and Click contracts would do), the City should instead be working from clear, Council-established policy goals for managing Austin's biosolids (for example, continuing or expanding the award-winning Dillo Dirt program, or specifically limiting land application of unstable biosolids sludge) and seeking the best contractor and proposal to meet those specific goals.

Indeed, TDS' strong recommendation is the immediate termination of both Austin Water RFPs, followed by a full Council / community stakeholder consideration of Austin's biosolids policies, and the subsequent issuance of a single Invitation For Bids (IFB) reflecting Council's established priorities, including a prescription for achieving those priorities. This IFB should be exempted from ALO compliance in order to give policymakers as many contracting choices as possible. There is still sufficient time to accomplish this before the current Synagro contract extension expires in mid-March 2017.

Failing termination of the RFPs, a full consideration of City biosolids policy, and issuance of an IFB, at a bare minimum, the current Austin Water process should not culminate in an executed contract unless and until the full, unredacted terms of the Synagro and Click contracts (including their RFP responses) have been made public with sufficient time for vetting by policy makers and the community, including all proposed charge rates for all proposed services. In addition to releasing an unredacted contract (as Synagro promised to do at the 8/10/2016 City Council meeting), TDS would also urge that Synagro be required to identify all facilities where they currently produce the "agricultural compost" product proposed to be produced at Hornsby Bend so the City can verify representations regarding odor issues. Please note that in the past month I've personally visited two facilities in California where the exact same "agricultural compost" product proposed for Hornsby Bend is currently being produced. Because "agricultural compost" is produced using far less bulking agent and in a fraction of the time than conventional compost like Dillo Dirt, the odor at both facilities was far too great to even consider conducting such a partial cooking process described very loosely and inappropriately as "composting", so close to the Hornsby neighbors, the major highway entering Austin, and the Austin airport. At a Synagro facility two hours outside of San Jose, the smell of ammonia burned my eyes and nose, the "compost" curing pile was smoking and had visible flames on the surface of the piles, and the insect infestation was worse than I have seen at a waste processing facility. It is unimaginable to me that such an operation would be tolerated anywhere in our community, let alone less than two miles from the front door of the Austin airport.

In addition, TDS believes Synagro should be required to provide some demonstration of a viable local customer base for large-scale production of its "agricultural compost" product; provide assurance that "agricultural compost" can be land applied within Travis County without running afoul of the County's Siting Ordinance for Solid Waste Facilities, and without TCEQ permits for each land application site; and to fully address how their proposed management plan at Hornsby Bend would substantially differ from the operations that are the subject of a lawsuit filed just last month by more than 100 residents of Upper Mount Bethel Township, Pennsylvania, who allege that Synagro's land application of Class A biosolids have compromised public health and safety, including "running noses, burning eyes, burning throats, respiratory distress, irritated skin, and rashes" as well as "airborne particulate matter … posing the risk of infection and illnesses." I encourage you to go to the TDS website postings on the Hornsby RFPs and see the article, court filings, transcripts and other things involving Synagro and their representatives, and their method of operation.

Finally, I would note again that, despite being forced to forgo responding to RFPs in the face of City staff's misapplication of the ALO, the City expressly can, under the terms of our existing 30-year waste disposal contract, negotiate with TDS for the provision of solid waste, recycling and composting services, including those requested in the Austin Water RFPs, outside of the RFP process. Indeed, based on our experience as the region's largest composter, and the current operator of two major biosolids composting facilities (San Antonio River Authority and City of Victoria), I am absolutely confident in TDS' ability to properly compost 100% of Austin's biosolids into Dillo Dirt, to market and sell it all, and to deliver a significant long-term cost savings to the City, without the problems associated with the controversial "agricultural compost" production process, which does not produce a stabilized finished compost, as defined by the U.S. Composting Council. If City Council members are inclined to request that City staff explore additional options, TDS would be eager to do so. Regardless, please know that our motivation in bringing forward these concerns is to try to convey to you that the staff's concerted efforts to not do business with TDS, and their efforts to silence our ability to communicate with ZWAC and Council has unnecessarily limited valuable options available to the City to meet

and exceed our shared goals of affordably meeting the Council's Zero Waste goals. I urge you to not apply ALO restrictions on RFPs and IFBs related to solid waste, composting and recycling solicitations.

Sincerely,
Bob Gregory
President & CEO
Texas Disposal Systems, Inc.
512-619-9127 (m)

Bob Gregory, Texas Disposal Systems

Item 46: Citywide Dumpster Collection Services with Republic Services

- TDS urges the City Council to vote NO on Agenda Item 46, and to direct City staff to: create an IFB for only City department buildings and staff-run facilities; not compete with private haulers and processors; and submit future solicitations to the ZWAC and EUC for policy review prior to release.

- TDS did not respond to this RFP because it represents dramatic changes in City policy, which TDS would have been unable to address with City Council members under the restrictions of the Anti-Lobbying Ordinance. TDS also did not respond because the RFP requested pricing for services that are reserved to licensed private haulers, including special event services that TDS currently has under contract with event organizers.

- For decades, there has been an understanding that the City would service only single-family residences and small businesses within residential routes that only need residential-style collection, while commercial and multi-family properties requiring dumpster service would be serviced by licensed private haulers in a competitive market.

- Approval of this contract would provide City staff the means to take over all commercial trash, compostables and recyclables hauling in Austin. Texas Health and Safety Code Section 364.034 (a) allows staff to do this, and this contract would provide the means by engaging Republic as a "toll hauler" to furnish trucks, dumpsters and employees to act on the City's behalf.

- City Council never directed staff to consolidate and expand these contracts, as City staff have claimed.

- City staff has refused to provide a copy of the Republic RFP response or the proposed contract, or to answer any substantive questions from advisory commissions or the public regarding Republic's proposal or the proposed contract. City staff even required the RFP reviewers to sign non-disclosure agreements to guarantee their silence. Most alarmingly, it remains unknown which landfill Republic will use to dispose of the waste from this contract.

- City Council unanimously rejected staff's request to renew the Austin Energy portion of this contract with Republic last December due to their planned use of the Waste Management Austin Community Landfill (WMI-ACL). The exact same set of facts very likely exists in this case, however City staff will not divulge which landfill Republic intends to use. It is either the WMI-ACL, or an out-of-town facility requiring an enormous volume of truck traffic.

- Approval of this contract could provide the basis for Republic to re-open its Northeast Austin Sunset Farms landfill. The Rule 11 Agreement and the Restrictive Covenant are not binding on the owners of the Sunset Farms site. The owners of record of the site did not sign or file them.

- If Republic utilizes its reopened Sunset Farms landfill or the WMI-ACL, either Republic or WMI could sue the City if the City were to oppose an expansion of either facility because the City would have approved a contract that committed waste to that facility beyond the current expected operating life of the WMI-ACL as currently

permitted, which is approximately 4.5 years.

- Republic did not respond to the RFP by the submission deadline. TDS representatives were present at the bid opening and watching online when purchasing staff announced that WMI was the only respondent to the RFP. Only later did staff announce that they had received two responses.

- Staff has not explained the huge increase in requested funding approval. The original facilities contract had approximately $6,000,000 approved for a six-year period. The Austin Energy portion that has been added to this contract represents less than $1,000,000 over the life of the contract, according to staff. What basis is there to add approximately $10,000,000 in additional approved funding?

- Emergency services should not be included in the budget request. Also, the City has already approved a separate $1,200,000 contract for disaster debris cleanup.

- In 2009, City Council did direct City staff to "implement recycling" at City co-sponsored events for which the City Council waives fees by separate ordinance, however City Council did *not* direct City staff to provide free recycling to these events, to implement recycling for events for which the City does *not* waive fees, or to compete for recycling, solid waste and composting services at *any* Austin event, which City staff has already begun to do.

- City staff could have easily met City Council's directive by referring event promotors to City-licensed haulers capable of meeting their needs, as they did in the past. Instead, City staff has stated they will compete to provide comprehensive services for all events in Austin. City staff has confirmed that it is their position that City departments can unilaterally declare any event in Austin a City co-sponsored event and thus eligible for services from City staff's "toll hauler."

- Note that this RFP included a list of nineteen events to which Republic may now provide services, if this contract is approved. Only two of the events on this list are City co-sponsored events. Seventeen of the events listed are customers of TDS.

- If this contract is approved, it will be an endorsement of City staff's current and planned distortions of existing policy prohibiting City staff from providing dumpster services to commercial businesses. This contract is not consistent with the City policy contained in City Code 15-6-11 through 13, which reserves commercial services, such as those the staff intends to provide to events, to licensed private haulers.

Item 52: Waiver of Anti-Lobbying Ordinance for Biosolids and Composting Solicitations

- TDS urges the City Council to vote YES on Item 52 IF it is amended to waive the restrictions and penalties of the Anti-Lobbying Ordinance for all future City solicitations for all biosolids and composting processing and disposal, *and* all solid waste and recycling processing and disposal. This is appropriate and indeed urgent given the singular circumstance of City-licensed operators (private haulers and processors like TDS) being forced to compete directly with their own regulator, as the associated Items 46 and 53 propose to do.

- The minimum requirement for adopting Item 52 must be the simultaneous rejection of Item 53, the Synagro contract, in order to clearly avoid any appearance of a City Council sanction of the Anti-Lobbying Ordinance

violations that occurred during this RFP process. In this circumstance, a new RFP or IFB should be issued only after City biosolids management policies have been clearly established by the City Council, with the new solicitation(s) designed to achieve clear policy goals.

- TDS otherwise urges the Council to vote NO on Item 52, if City staff's intention in bringing forward the item is, as it appears, to retroactively waive the Anti-Lobbying Ordinance in order to forgive violations that occurred for *any* reason. To do so would be to abandon objectivity and consistency in the application on what amounts to a limit on free speech – a chilling prospect.

- Please be reminded that in 2010, City staff charged TDS with a violation of the Anti-Lobbying Ordinance associated with a solicitation to which we had not responded. City staff refused to withdraw the violation, and TDS was forced to file suit against the City. A Federal judge ruled that no violation had taken place and ordered the disqualification removed from TDS' record. City staff's demonstrated misapplication of the Anti-Lobbying Ordinance – including strategic staging of RFPs to maximize limitations on contractors' ability to communicate with the City Council or public – *along with the conflict inherent in being forced to compete with a regulator*, is the reason TDS has been unable to respond to recent City solicitations.

Item 53: "Beneficial" Reuse of Biosolids

- TDS urges the City Council to vote NO on Item 53 and to instead direct staff to create a new RFP or IFB that is reflective of established City biosolids management policy; that requires the continuation of the Dillo Dirt program; that is reviewed by the Zero Waste Advisory Commission (ZWAC) and Water and Wastewater Commission (WWC) prior to publication; and that does NOT include Anti-Lobbying Ordinance restrictions.

- Please recall that on August 11, 2016, City Council did not act on City staff's request to approve this contract but rather directed that a detailed policy review of the contract be undertaken by ZWAC and the WWC to ensure that the contract was in compliance with City policy and did not create new policy not considered by City Council.

- A limited policy discussion was held by a joint working group of the ZWAC and WWC over the course of three private meetings, and some policy positions were formulated by this working group; however, no review of the proposed Synagro contract took place. The contract was only supported by the joint working group based on City staff's stated intent to reflect the working group's policy goals in the final contract.

- The full WWC did recommend approval of the contract, but without being able to fully review the contract documents. The full ZWAC was prohibited by staff from even discussing the contract, and were only allowed to recommend policy preferences. Overall, it is plain that City staff prevented the Commissions from adequately fulfilling the City Council's August 11th directive.

- Further, Despite Synagro's public commitment on August 11th to release a complete version of their proposal and contract for public review, significant redactions remain in the latest posted version. According to Synagro these redactions concern subcontractors and offsite facilities that will be used by Synagro and the City, despite the fact that Synagro has as the same time certified that no subcontractors would be used to provide the contracted services.

- While it appears City staff has made some limited changes to the posted contract documents, even the limited policy statements adopted by the commissions have not been adequately addressed. Based on the available information, this contract will still result in the termination of the Dillo Dirt program, as there is no requirement for Synagro to produce any amount of Dillo Dirt, and no prescriptive method for production of Dillo Dirt or *any* type of compost. Indeed the draft contract still states that Synagro's entire composting process will take three to four weeks, while it is impossible to make compost in this amount of time. There is also no requirement that the Travis County Siting Ordinance for Solid Waste Facilities be adhered to for either processing, composting or land application of sludge.

- If approved, City staff can use this contract as the basis to implement flow control of organic materials to a facility designated by contract, or to a City-owned facility, such as Hornsby Bend.

- Synagro has a well-documented recent history of corruption and bribery scandals. Further, since this contract was last before you, Synagro has been sued by over one hundred plaintiffs in Pennsylvania alleging severe impacts to their health and the environment caused by the land application of Class A biosolids, the exact process Synagro proposes for Austin.